Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 2002

MICHAEL J. MARKOWSKI,
Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

Petition for Writ of Certiorari
To The United States Court Of Appeals For The District of Columbia

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Petition for Writ of Certiorari

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QUESTION PRESENTED

The Securities and Exchange Commission began an enforcement action against Michael J.Markowski on March 20th of 1997, six years after Markowski's asserted misconduct ended but only one year after the district court had enjoined Markowski on the basis of a consent decree, from violating the securities laws. The District of Columbia Circuit ruled that the statute began running upon the entry of the injunction. The Question Presented is:

> Whether the 5-year statute of limitations in 28 U.S.C. § 2462, providing that the time begins when the claim is first accrued, is renewed or revived upon entry of a consent decree after the limitations period has expired.

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The unreported opinion of the United States Court of Appeals for the District of Columbia Circuit is reproduced at Appendix A to this Petition. The Order of the Court of Appeals denying the Petition for Rehearing is reproduced at Appendix B and C.

JURISDICTION

The Order Instituting Public Proceedings (OIP) was filed on March 20, 1997. The Securities and Exchange Commission imposed a permanent bar on petitioner on March 20, 2001. Petitioner filed a timely Petition for Review to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals entered its judgment on April 25, 2002 affirming the S.E.C. Order. Markowski timely filed a Petition for Rehearing and Rehearing *en banc* on May 22nd. The Petitions were denied on June 13, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C.§ 2462: Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper services may be made thereon.

Section 15(b)(6)(A): With respect to any person who is associated, who is seeking to become associated, or, at the time

of the alleged misconduct, who was associated or was seeking to become associated with a broker or dealer, or any person participating, or, at the time of the alleged misconduct, who was participating, in an offering of any penny stock, the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar such person from being associated with a broker or dealer, or from participating in an offering of penny stock, if the Commission finds, on the record after notice and opportunity for a hearing, that such censure placing of limitations, suspension, or bar is in the public interest and that such person-

(i) has committed or omitted any act or omission enumerated in subparagraph (A),(D), (E), or (G) or paragraph (4) of this subsection;

(ii) has been convicted of any offense specified in subparagraph (B) or such paragraph (4) within 10 years of the commencement of the proceedings under this paragraph; or

(iii) is enjoined from any action, conduct, or practice specified in subparagraph (6) of such paragraph (4).

STATEMENT OF THE CASE

The Order Instituting Public Proceedings (the "OIP") was filed on March 20, 1997 seeking a permanent bar. The OIP acknowledges and admits that the wrongful conduct charged against Markowski commenced in February of 1990 and ended in January of 1991. The basis for filing the OIP more than six years after the asserted misconduct had ended was an injunction entered on February 9, 1996 as basis of a consent decree in which Markowski neither admitted nor denied the underlying conduct. Markowski raised the statute of limitations issue in his Answer to the Commission's Order Instituting Public Administration Hearing. The Administrative Law Judge first deferred ruling on the statute of limitations issue , then ruled based upon the S.E.C. opinion in *In re Russell Koch*, 64 S.E.C.

1538 (S.E.C. 1997) (subsequently reversed by *Koch v. S.E.C.*, 177 F. 3d 784 (9th Cir. 1999)).

The Securities and Exchange Commission affirmed the order for a permanent bar and denied the statute of limitations defense. Markowski appealed solely on the basis of limitations to the D.C. Circuit, which affirmed the decision of the S.E.C.

REASONS FOR GRANTING THE WRIT

The opinion of the District of Columbia Circuit is in conflict with a decision of the United States Court of Appeals for the Ninth Circuit and the Principles of Decision by this Court.

In rejecting Markowski's claim that the S.E.C. action was barred by the applicable statute of limitations – 28 U.S.C. § 2462 – the District of Columbia Circuit simply relied on an earlier decision of that Court, *Proffitt v. FDIC,* 200 F.3d 855 (D.C. Cir. 2000). While recognizing that a different statute was involved in *Proffitt*, the Court stated that Markowski's *argument* was the same as that presented in *Proffitt*. The Court's decision, and the earlier decision of another panel in *Proffitt*, is in direct conflict with *Koch v. S.E.C.*, 177 F. 3d 784 (9th Cir. 1999). It is this Court's constitutional purpose to grant this Petition and resolve the dispute.

This proceeding involves a question of exceptional importance governing the statute of limitations under 28 U.S.C. § 2462 ("when claim first accrued") and Section 15 (b)(6)(A) of the Securities Act ("time of alleged misconduct"). The Order Instituting Proceedings (OIP) was filed more than six years after the alleged misconduct but less than five years from the date of a consent injunction that itself had been filed more than five years after the date of the alleged misconduct. This Court's ruling creates an eleven year plus period for limitations to run.

The District of Columbia's ruling stated:

MEMORANDUM

The SEC commenced this enforcement action in March 1997, six years after Markowski's misconduct ended but only one year after a district court had enjoined Markowski from violating the securities laws. The misconduct and the injunction each sufficed to permit the Commission to bar Markowski from associating with any broker or dealer. *See* 15 U.S.C. § 78o(b)(6)(A)(i), (A)(iii). The Commission's action is time-barred, however, if it was commenced more than five years after "the claim first accrued." 28 U.S.C. § 2462. Markowski contends that the claim accrued when his misconduct occurred, because the Commission could have brought its action then. The Commission argues that the five-year clock started running anew in 1996, when the injunction was issued and a different statutory prerequisite was thereby satisfied.

This court effectively rejected Markowski's argument in *Proffitt v. FDIC*, 200 F.3d 855, 862-65 (D.C. Cir. 2000). The court held the FDIC could bring an action to bar Proffitt from the banking industry because, although sufficient statutory prerequisites were in place for the action more than five years before the FDIC commenced it, a different and independently sufficient prerequisite was satisfied within five years of the date the action was commenced. *Id.* at 864-65 ("While the FDIC might well have brought an action earlier under the 'will probably suffer' language, its

> failure to do so does not render untimely, and therefore, unauthorized, its action based on the later occurring effect"). Although the precise statutory provisions at issue in *Proffitt* and this case differ, Markowski cannot prevail because he fails to offer any relevant distinction between his argument and the argument rejected in *Proffitt*.

Order of Judgment, April 25, 2002.

The S.E.C. in *Koch* had ruled that the time of the alleged misconduct of the parties was immaterial for determining the running of limitations. This still is the basis for the S.E.C. ruling in this case. This error in the S.E.C. reasoning was the rationale for the Ninth Circuit's opinion in *Koch* and is grounds why this Court needs to grant certiorari:

> It may be technically true, but makes no sense whatsoever, to say (as does the SEC) that Koch was barred from trading in penny stocks because of the 1995 injunction. **The injunction itself is not an act of misconduct.** The existence of the injunction may make the SEC's job of proving Koch's unfitness easier, but the substance of the SEC's case against Koch remains the underlying violations he is alleged to have committed.
>
> That the **injunction serves no purpose independent of the underlying misconduct** is evident from the SEC's reliance on the factors set forth in *Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other* grounds, *450 U.S. 91, 67 L. Ed. 2d 69, 101 S. Ct. 999 (1981),* in arguing that barring Koch serves the public interest. Those factors are as follows:
> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the

> degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.
> *Id.* (quoting *SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978))* (internal quotation marks omitted) (quoted in Respondent's Brief at 48). Each of the factors relates solely to Koch's conduct which gave rise to the 1995 injunction or his failure to acknowledge his past wrongdoing. Thus, for purposes of *Landgraf*, the event to which the Remedies Act attaches the legal consequence of a penny stock bar is the **misconduct the targeted individual is alleged to have committed, regardless of whether the SEC chose to bring the proceeding on the basis of an injunction, a conviction or the underlying conduct.**

Koch, 177 F. 3d at 787-788 (emphasis added).

The S.E.C.'s argument that no claim accrued until after the entry of the injunction is flawed. The S.E.C. argument allows the S.E.C. to extend and restart limitations to file the OIP that otherwise was barred by limitations by simply and belatedly choosing in its entire, sole, and arbitrary discretion to seek an injunction after five years had passed. The underlying conduct that was the basis for the bar obtained by the subsequent OIP proceeding had previously occurred.

The bar is not automatic upon obtaining the injunction—hearing and notice are required. More significantly, the hearing for the OIP punishment is based upon the prior "alleged misconduct" as required by section 15(b)(6)(A). As the Ninth Circuit stated:

> Koch sees the 1995 injunction as merely a procedural short-cut --a means by which the SEC can establish misconduct without having to prove up the underlying wrongdoing. Nevertheless, the additional remedies provided by the Act are meant to punish, or prevent the recurrence of, misconduct by the party against whom the injunction was entered. At the very least, argues Koch, the life-long ban on penny stock dealing attaches new and grave consequences to his pre-Act conduct.
>
> We agree with Koch. The Remedies Act was passed in order to "curb[ ] the pervasive fraud and manipulation in the penny stock market" by, *inter alia*, "expanding the scope of the Securities and Exchange Commission's ... authority to bar individuals from the securities business." H.R. Rep. No. 101-617, at 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1408, 1408-09. Though the SEC may prosecute a case based on the independent predicate grounds of an injunction, a conviction or the misconduct itself, the point of any such proceeding is always the same: to protect the public from individuals who have shown themselves unfit to participate in the penny stock market because of earlier misconduct.

Koch, 177 F. 3d at 787.

The S.E.C. believes it can file an injunction at any time, and if the request for injunction is stale, it is the responsibility of the court to dismiss. The S.E.C. would appoint the district court as the gatekeeper. Unfortunately, many of the injunctions, which normally wouldlly be considered stale claims, are consent decrees, which a district court has every reason to accept. The S.E.C. further proudly asserts if it is able to use the

threat of an expensive and uncertain trial to obtain a consent decree on an otherwise stale injunction claim, the S.E.C. gets a special reward. It can then restart the running of limitations and stack on an additional five years to seek a penalty. The S.E.C.'s position is wrong. It cannot be supported either rationally or equitably, and certainly not by the literal language of 28 U.S.C. § 2462 or § 15(b)(6)(A).

The S.E.C.'s position violates the fundamental purposes of the statute of limitation: repose, elimination of stale claims, and certainty about a plaintiff's right to seek recovery and a defendant's potential liabilities. See, *e.g., Klehr* at 187. The S.E.C. should not be permitted to run roughshod over the statute of limitations or the principles endorsed in *Klehr*, *Rotella*, *Johnson*, and *3M* by resurrecting barred claims.

The Supreme Court of the United States has indicated that when an interpretation of the statute of limitations produces a "foolish" result, it should be reconsidered:

> As a practical matter, a 4-year statute of limitations means nothing at all **unless one knows when the four years start running**. If they start, for example, on the tenth anniversary of the injury, the 4-year statute is more akin to a 14-year statute than to the Clayton Act. We would thus have been **foolish**, in Malley-Duff, to speak of "adopting" the Clayton Act statute, and of "patterning" the RICO limitation period after the Clayton Act, if all we meant was using the Clayton Act number of years. [Emphasis Added]

Klehr, 521 U.S. 179 at 199 (SCALIA, J., concurring).

The start of limitations should not depend on the absolute discretion of the S.E.C. Upon certiorari this Court can consider whether the S.E.C. position is foolish. The S.E.C. position

certainly does not comport with the language and purpose of the statute.

The recent Supreme Court decisions in *Klehr v. A.O. Smith Corporation*, 521 U.S. 179 (1997) and *Rotella v. Wood*, 528 U.S. 549 (2000) are instructive to the issues in this case. In discussing the importance of maintaining concrete time limits by strict enforcement of statutes of limitations, the Supreme Court opined:

> We conclude that the Third Circuit's rule is not a proper interpretation of the law. We have two basic reasons. First, as several other Circuits have pointed out, the last predicate act rule creates a limitations period that is longer than Congress could have contemplated. Because a series of predicate acts (including acts occurring at up to 10-year intervals) can continue indefinitely, such an interpretation, in principle, lengthens the limitations period dramatically. It thereby conflicts with a basic objective—repose—that underlies limitations periods. *See Wilson v. Garcia,* 471 U.S. 261, 271, 105 S.Ct. 1938, 1944, 85 L.Ed.2d 254 (1985) (citing *Adams v. Woods*, 2 Cranch 336, 342, 2 L.Ed. 297 (1805)); *Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345, 352, 103 S.Ct. 2392, 2396-2397, 76 L.Ed.2d 628 (1983). Indeed, the rule would permit plaintiffs who know of the defendant's pattern of activity simply to wait, "sleeping on their rights," *Ibid.*
>
> ....

Klehr v. A. O. Smith Corporation, 117 S.Ct. 1984, 1989, 521 U.S. 179, 181 (1997).

The holding in *Klehr* eliminated the "last predicate" rule for accrual of a cause of action under the civil RICO statute because it violated the underlying policy purposes of the statutes of limitations. In *Rotella v. Wood*, the Supreme Court continued along this path by disapproving of another accrual rule that lacked predictable time standards, the "injury and pattern discovery rule":

> We think the minority injury and pattern discovery rule unsound for a number of reasons. We start with the realization that under the provision recognizing the possibility of finding a pattern of racketeering in predicate acts 10 years apart, even an injury occurrence rule unsoftened by a discovery feature could in theory open the door to proof of predicate acts occurring 10 years before injury and 14 before commencement of litigation. A pattern discovery rule would allow proof of a defendant's acts even more remote from time of trial and, hence, litigation even more at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities. See, *e.g., Klehr, supra,* at 187; *Malley-Duff, 483 U.S. at 150, 156; Wilson v. Garcia, 471 U.S. 261, 270, 271, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985).*

Rotella v. Wood at 1080-81.

Although *Klehr* and *Rotella* concerned the application of the civil RICO statute and the appropriate test for determining when the cause of action accrued, they are relevant to this case because they affirm the justifications for the federal statutes of

repose, federal statutes of limitation and the policy against stacking or extending limitation periods. These principles are fully applicable to the general federal statutes of limitations at bar, namely 28 U.S.C. §2462, which applies to but is not limited to SEC proceedings. See *Johnson v. S.E.C.*, 87 F.3d 484, 486 (D.C. Cir. 1996).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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APPENDIX

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Appendix C – Order of the District of Columbia Circuit Court denying Petition for Panel Rehearing, dated June 13, 2002 C-1

APPENDIX A

Unreported Opinion of the United States Court of Appeals for the District of Columbia Circuit Dated April 25, 2002

MICHAEL J. MARKOWSKI,
Petitioner
vs.
SECURITIES AND EXCHANGE COMMISSION,
Respondent
No. 01-1181

Before GINSBURG, Chief Judge, HENDERSON and ROGERS, Circuit Judges.

Petition for Review of an Order of the Securities and Exchange Commission

PER CURIAM.

JUDGMENT

This petition for review was considered on the record from the Securities and Exchange Commission and on the briefs filed by the parties. It is ORDERED AND ADJUDGED that the petition for review be denied for the reasons given in the attached memorandum. Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R.App. P. 41(b); D.C.Cir. Rule 41.

MEMORANDUM

The SEC commenced this enforcement action in March

1997, six years after Markowski's misconduct ended but only one year after a district court had enjoined Markowski from violating the securities laws. The misconduct and the injunction each sufficed to permit the Commission to bar Markowski from associating with any broker or dealer. *See* 15 U.S.C. § 78o(b)(6)(A)(i), (A)(iii). The Commission's action is time-barred, however, if it was commenced more than five years after "the claim first accrued." 28 U.S.C. § 2462. Markowski contends that the claim accrued when his misconduct occurred, because the Commission could have brought its action then. The Commission argues that the five-year clock started running anew in 1996, when the injunction was issued and a different statutory prerequisite was thereby satisfied.

This court effectively rejected Markowski's argument in *Proffitt v. FDIC,* 200 F.3d 855, 862-65 (D.C.Cir.2000). The court held the FDIC could bring an action to bar Proffitt from the banking industry because, although sufficient statutory prerequisites were in place for the action more than five years before the FDIC commenced it, a different and independently sufficient prerequisite was satisfied within five years of the date the action was commenced. *Id.* at 864-65 ("While the FDIC might well have brought an action earlier under the 'will probably suffer' language, its failure to do so does not render untimely, and therefore, unauthorized, its action based on the later occurring effect"). Although the precise statutory provisions at issue in *Proffitt* and in this case differ, Markowski cannot prevail because he fails to offer any relevant distinction between his argument and the argument rejected in *Proffitt.*

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1181 **September Term, 2001**

Filed On: June 13, 2002

Michael J. Mankowski,
Petitioner

v.

Securities and Exchange Commission,
Respondent

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

For the Court:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1181 **September Term, 2001**

Filed On: June 13, 2002

Michael J. Mankowski,
Petitioner

v.

Securities and Exchange Commission,
Respondent

BEFORE: Ginsburg, Chief Judge, and Henderson, and Rogers, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing filed May 21, 2002, it is

ORDERED that the petition be denied.

Per Curiam

For the Court:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk